



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PEMCO Aeroplex, Inc.

File: B-255861.2

Date: June 1, 1994

J. Scott Hommer III, Esq., Wm. Craig Dubishar, Esq., Julian S. Brown, Esq., and Lars E. Anderson, Esq., Venable, Baetjer, and Howard, for the protester. John Pettit, Esq., Milton D. Watkins, Esq., and Michael J. Fair, Esq., Department of the Air Force, for the agency. Sylvia Schatz, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against rejection of best and final offer as technically unacceptable is denied where solicitation required offeror to establish that it could furnish all necessary items of support and test equipment and tooling necessary to perform depot-level aircraft maintenance; and agency reasonably determined that protester's identification of essential, required equipment as not required indicated that protester did not fully understand the complexity and scope of the depot maintenance requirements and cast doubt on its ability to accomplish the work load while meeting safety and technical requirements.

DECISION

PEMCO Aeroplex, Inc. protests the Department of the Air Force's issuance of a work assignment to the Tinker Aircraft Company (TAC), under request for proposals (RFP) No. F34601-93-R-04001, for the acquisition of depot-level maintenance for the E-3 Airborne Warning and Control System (AWACS)

aircraft.¹ PEMCO challenges the evaluation of its proposal and the conduct of discussions.

We deny the protest.

The RFP, issued on February 11, 1993, contemplated the award of a firm, fixed-price contract for a base and 2 option years. The RFP required offerors to furnish all support and test equipment, and common and special tools, necessary to support the depot maintenance program. In this regard, the solicitation work specification and attachments to the specification described numerous required depot maintenance tasks; these descriptions referenced specific technical orders (TO), which in turn identified the items of special tooling and support equipment (ST/SE) which were necessary to perform the required tasks. In addition, attachment J to the solicitation provided a general list of ST/SE, which it indicated was "for information only, to help the SOR [source of repair] develop a list of necessary tools and equipment." Offerors were generally cautioned to submit adequate and sufficient information in their proposals to enable the Air Force to ascertain their capability to perform all of the requirements contemplated by the RFP. In addition, offerors were specifically required to (1) identify all ST/SE as defined in the work specification; (2) list available, locally manufactured, and to be acquired ST/SE; (3) provide a prepositioning plan showing how to integrate the ST/SE into the production plan; and (4) provide a utilization plan to assure that the production rate can be maintained.

Award was to be made to the responsible offeror whose offer represented the best value to the government based on an integrated assessment of each proposal. The RFP listed the evaluation factors, in descending order of importance, as: (1) production, which consisted of six subfactors of equal importance, including subcriteria 1.4, ST/SE; (2) management; (3) quality; (4) safety; and (5) cost/price. Under each factor and subfactor, the proposals were to receive a color/adjectival rating (i.e., blue/exceptional, green/acceptable, yellow/marginal, or red/unacceptable), a proposal risk rating, and a performance risk rating. The

¹This competition was conducted pursuant to statutory authorization contained in the Department of Defense (DOD) Appropriations Act of 1993, Pub. L. No. 102-396, § 9095, 106 Stat. 1876, 1924 (1992), and the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 353, 106 Stat. 2315, 2392 (1992). These statutes permit competition between DOD depot maintenance activities and private firms. TAC, a public offeror, is actually the Oklahoma City Air Logistics Center (AC-ALC), Directorate of Aircraft, Tinker Air Force Base.

solicitation provided that the technical factors would be "of primary consideration," while total cost/price (for the base and option years) would be "a secondary consideration."

The Air Force received two proposals, TAC's and PEMCO's, in response to the solicitation. During the ensuing negotiations with offerors, the Air Force repeatedly questioned PEMCO's approach to furnishing required ST/SE and advised the firm of the need to provide the required information concerning ST/SE. For example, the Air Force issued a deficiency report to PEMCO noting that:

"[t]he offeror was tasked to provide a plan showing methodology to preposition and integrate E-3 [ST/SE] into the E-3 . . . work flow. No plan was presented, only a statement phasing in existing -135A/C [aircraft] ST/SE into the E-3 program. The offeror must provide their plan to acquire and incorporate E-3 unique ST/SE as contained in App [Appendix] A, Atch [Attachment] J, or a detailed workaround.

"-135 [aircraft] ST/SE will not totally satisfy E-3 task requirements. The lack of E-3 unique ST/SE will prevent the offeror from accomplishing the E-3 Depot Maintenance Program."

When PEMCO responded that it would commence phase-in of E-3 unique ST/SE at contract award, the agency issued another deficiency report, reiterating the requirement that offerors must provide a prepositioning and integration plan for E-3 unique ST/SE as contained in attachment J or a detailed work around. The agency specifically cautioned that "many of the tools/equipment items may not be readily available from Government supply or commercial sources"; it asked what PEMCO's plan was for resolving tool/equipment shortages. Although PEMCO responded by submitting a phase-in plan for 78 items of ST/SE, the Air Force considered the plan inadequate. The agency advised PEMCO during discussions to use attachment J as a guide and specify, by item, whether the item was currently available or was to be locally manufactured or purchased, and if it were to be manufactured or purchased, when it would be available. Although PEMCO then identified additional items of ST/SE, its response failed to include part numbers and failed to identify key items of ST/SE. Further, in response to the agency's subsequent admonition to consult attachment J, PEMCO provided a copy of attachment J in which it had marked as "not required," without any explanation or proposal of acceptable alternates, several items of ST/SE which were listed as required in the TOs.

In its first request for best and final offers (BAFO), the Air Force again advised the firm that, as previously noted during discussions, satisfactory responses with respect to required ST/SE and PEMCO's proposed production task hours were still lacking. Upon receipt of PEMCO's BAFO, however, the agency determined that PEMCO continued to identify as "not required" at least 30 items of ST/SE listed as required in the applicable TOs. Thus, when the Air Force reopened discussions with the offerors and requested a second round of BAFOs, the agency advised PEMCO that its proposal remained deficient with respect to required ST/SE. The agency also cautioned that PEMCO's "proposed production task manhours appear significantly low."

Although PEMCO's total evaluated BAFO price (\$33,843,768) was less than TAC's (\$37,352,158), its technical proposal was determined to be unacceptable. The Air Force found that PEMCO's second BAFO listed as "not required" 23 items of ST/SE that were in fact specified in the TOs. The agency concluded that PEMCO's failure to identify essential items of required ST/SE indicated that it did not fully understand the complexity and scope of the E-3 depot maintenance requirements and cast doubt on its ability to accomplish the work load while meeting safety and technical requirements. In addition, PEMCO's proposal was evaluated as proposing insufficient hours to perform the required tasks. As a result, PEMCO's BAFO received a rating of unacceptable for both the ST/SE subfactor of the production factor and the production factor overall, and a "high" performance risk rating based on PEMCO's failure to identify all required ST/SE. The Air Force then made award to TAC.

During a subsequent September 10 debriefing, PEMCO was informed of the 23 required items of ST/SE that were omitted from its BAFO and whose omission had resulted in a rating of technically unacceptable. PEMCO then filed an agency-level protest on September 23. In addition, by letter of October 4, PEMCO submitted an unsolicited offer, in which it included the 23 items of ST/SE that the agency had identified during its debriefing with the firm as the required items missing from its proposal, and 6 additional items that PEMCO identified as required. When the Air Force denied PEMCO's agency-level protest, and stated that it would not consider the protester's October 4 offer because it was late, this protest followed.

LATE MODIFICATION

PEMCO argues that the Air Force improperly rejected its October 4 offer. According to PEMCO, its October 4 submission should have been considered because it was received prior to award. Specifically, PEMCO argues that a work assignment issued to a public offeror cannot result in

a contract, and that therefore no award has been made under this solicitation. In the alternative, PEMCO contends that the October 4 submission should have been considered as an unsolicited offer.

Whether or not an "award" has been made is irrelevant here. PEMCO's October 4 submission was not an unsolicited proposal;² it was a modification of its second BAFO which was submitted in response to the solicitation after the time set for receipt of second BAFOs. However, proposals and modifications to proposals that are received in the designated government office after the exact time specified are "late" and shall be considered only if (1) they are received before award is made, and (2) the circumstances meet the specific requirements of the provision at Federal Acquisition Regulation (FAR) § 52.215-10, "Late Submissions, Modifications, and Withdrawals of Proposals." FAR § 15.412(c). In this regard, FAR § 52.215-10(a) provides that any proposal received after the exact time set for receipt will not be considered unless it is received before award is made and it is covered by one of the specified exceptions: submissions that are timely dispatched but are received late due to delays in the mail service or due to mishandling by the government, or a late submission that is the only proposal received. In addition, FAR § 52.215-10(g) provides that a late modification of an otherwise successful proposal that makes its terms more favorable to the government will be considered at any time it is received and may be accepted.

None of these exceptions applies here. PEMCO's October 4 submission was submitted to the Air Force more than 1 month after the August 23 date set for receipt of second BAFOs and at the time of submission TAC was the successful offeror. Therefore, the Air Force's refusal to consider the modification was proper.

TECHNICAL EVALUATION

PEMCO challenges the Air Force's rejection of its second BAFO on the basis of the firm's failure to propose items of ST/SE that the agency maintains were required for contract performance. According to PEMCO, rejection of its proposal was improper, because the items were neither identified in

²Since an "unsolicited proposal" is defined as a written proposal that is submitted to an agency on the initiative of the submitter for the purpose of obtaining a contract with the government and which is not in response to a formal or informal request, FAR § 15.501, PEMCO's October 4 submission is not an unsolicited proposal as it was submitted in response to the current RFP.

the RFP as required nor in fact necessary to perform the contract. Furthermore, PEMCO argues that since it correctly identified in its second BAFO most of the ST/SE needed to perform the contract, and since, according to the protester, the items of ST/SE not identified were readily available from either commercial sources or should have been provided as government-furnished equipment, its failure to identify the items was only a minor weakness that was readily correctable.

In reviewing an evaluation, we will not reevaluate a technical proposal but we will examine the agency's evaluation to ensure that it was reasonable. Allied Mgmt. of Texas, Inc., B-232736.2, May 22, 1989, 89-1 CPD ¶ 485. Here, we believe that the Air Force reasonably determined that PEMCO's BAFO was technically unacceptable.

First, the solicitation clearly advised offerors that the contractor must furnish all required special and common tools and support and test equipment necessary to support the E-3 AWACS Depot Maintenance Program.³ Although attachment J to the RFP did not establish a definitive list of required ST/SE, but instead only listed items of ST/SE that might be needed, the solicitation elsewhere furnished specific guidance regarding the items of ST/SE required to perform the contract. Specifically, the work specification and the attachments to the work specification, in describing the required depot maintenance tasks, referenced specific TOs which clearly spelled out the particular items of ST/SE that were necessary to perform the work. By cross-referencing the required task descriptions with the specific TOs, an offeror could determine which items of ST/SE were needed to perform the required tasks. In particular, the 21 items of ST/SE that PEMCO identified as "not required" in its BAFO and which are at issue here were clearly referenced in the specific TOs.⁴

³To the extent that PEMCO is now objecting to this solicitation provision, arguing that the 21 items of ST/SE missing from its proposal should have been furnished by the government, this aspect of its protest is untimely. Our Bid Protest Regulations require protests based upon alleged improprieties in an RFP which are apparent prior to the closing time for receipt of initial proposals to be filed prior to that time. 4 C.F.R. § 21.2(a) (1994).

⁴Although the Air Force originally stated that PEMCO was ineligible for award because it had identified in its BAFO as "not required" 23 items of required ST/SE, the Air Force has subsequently acknowledged that since other tools

(continued...)

Further, the record supports the Air Force's position that each of these items is essential for the direct performance of contract tasks. For example, the Air Force explains that two test adapters required by TO No. 1E-3A-2-22-1, but identified by PEMCO as "not required," are in fact essential; according to the agency, they are used in testing the aircraft's damper system, which prevents the aircraft from rolling when the wing tip is high or low. Likewise, the Air Force reports that PEMCO marked as "not required" the ST/SE identified by TO No. 1E-3-581 as required to support modification of the Have Quick A-NEF classified communications network. According to the agency, this modification is critical since in the event an aircraft's air cooling system fails, the modification will result in an alarm being sounded, thereby preventing the E-3 equipment from overheating and becoming damaged. In addition, the agency reports that the safety harness set required by TO No. 1E-3A-2-7, which PEMCO identified as "not required," is in fact essential for the safety of maintenance personnel, since it is used to keep maintenance personnel from falling from the aircraft while performing depot maintenance tasks. With but one exception, PEMCO has not rebutted the agency's determination that 21 items of ST/SE identified as "not required" in PEMCO's BAFO are in fact material items essential for direct performance of the contract requirements.⁵ Indeed, PEMCO itself has identified all these items "as required" in its late October 4 modification to its second BAFO.

Furthermore, we are not persuaded by PEMCO's assertion that the omission of the 21 items of ST/SE from its BAFO should have been treated as a minor weakness not affecting the acceptability of its proposal. In determining the materiality of information deficiencies, we look at such things as whether the RFP called for detailed information

⁴(...continued)

identified in PEMCO's BAFO could be substituted for 2 of the tools that were missing from PEMCO's BAFO, only 21 items of ST/SE were properly in question.

⁵The protester disagrees with the agency's position that the required router template assembly, necessary in order to repair honeycomb surfaces on the aircraft, is a critical item, as it claims that the template can be fabricated from any suitably sized sheet of plywood. However, even if we were to agree with its position in this regard, PEMCO was not prejudiced by the agency's determination that the router was needed, since PEMCO does not refute the agency's position that the other 20 items the firm identified as "not required" were essential to contract performance.

and the nature of the deficiencies. See Jack Faucett Assocs., B-253329, Sept. 7, 1993, 93-2 CPD ¶ 154. PEMCO's position fails to take into account the specific solicitation provisions requiring the submission with proposals of detailed information establishing an offeror's knowledge of, and ability to furnish, the ST/SE necessary to perform the required depot maintenance and support for the E-3 AWACS aircraft. Specifically, offerors were required not only to furnish all required special and common tooling and support and test equipment, but in addition, they were required to identify and explain their plans for acquiring the required items of ST/SE. Further, as discussed above, the 21 items in dispute were in fact necessary for the successful performance of numerous critical tasks required for maintaining the AWACS aircraft.

Finally, we consider it significant, as did the agency, that PEMCO did not merely overlook essential items of ST/SE; rather, it affirmatively represented that the necessary ST/SE was "not required." We believe that the Air Force reasonably determined that PEMCO's identification of key items ST/SE as not required gave rise to concerns that it did not understand the extent and scope of the E-3 depot maintenance requirements and cast doubt on PEMCO's ability to meet those requirements and support continued operation of the E-3 AWACS aircraft. In these circumstances, the agency reasonably concluded that PEMCO's failure to meet the solicitation requirement that it identify and explain its plans for acquiring required ST/SE amounted to a failure to comply with a mandatory material solicitation requirement. This failure precluded award to PEMCO based upon its BAFO.

PEMCO also challenges the evaluation of the awardee's proposal. The protester questions why its BAFO was considered deficient for failing to list 21 items of ST/SE when TAC's BAFO also failed to identify as required 11 of these same items but nevertheless was found acceptable.

Based upon our review of the record, however, we find nothing inconsistent or unreasonable in the agency's evaluation of TAC's BAFO as acceptable. The record shows that the agency did not consider TAC's BAFO to be deficient for failing to include these items on its list of ST/SE because TAC, in contrast to PEMCO, either proposed an acceptable substitute item/alternate approach or recognized the need for the required item in another portion of its BAFO. For example, the agency did not question TAC's failure to identify as required a router template assembly, which is necessary for repair of honeycomb surfaces on the aircraft, because TAC proposed to replace honeycomb surfaces on the aircraft rather than repair them. In contrast, PEMCO neither identified the router template as required, nor proposed to replace the honeycomb surfaces. Likewise, the

agency determined that TAC's failure to include in its list of ST/SE the damper test adapters necessary for checkout of the autopilot system was not a deficiency because TAC identified the need for an autopilot checkout in other portions of its BAFO. In contrast, PEMCO's BAFO stated that this item was not required. The agency also did not consider it a deficiency that TAC failed to include in its list the KG-40 key, a required communications security (COMSEC) item necessary to test the Have Quick A-NET modification, since TAC referenced in its BAFO a letter of agreement with the agency, in which the agency agreed to leave this classified COMSEC item on the aircraft during depot maintenance at TAC's facility, which was located on an Air Force base. In contrast, although PEMCO, which does not have an on-base facility, had been warned during a presolicitation conference and during discussions that the COMSEC equipment would be removed from the aircraft prior to its leaving the base, and that PEMCO therefore would need to borrow this equipment from a DOD security agency, PEMCO nevertheless stated in its BAFO that the COMSEC equipment was not required.

The record does show the agency inadvertently failed to note in its evaluation TAC's failure to identify as required a fuel flow systems test adapter, whose omission in PEMCO's BAFO was cited by the agency as supporting the finding of unacceptability. Since TAC, however, only failed to identify a single item of required ST/SE (compared to PEMCO's failure to identify 21 required items), it appears that it substantially complied with the solicitation requirements in this regard, and we do not believe that its isolated failure demonstrates that the agency was unreasonable in determining that TAC's proposal demonstrated that it understood and would comply with contract maintenance requirements. See Sabreliner Corp., B-248640; B-248640.4, Sept. 14, 1992, 92-2 CPD ¶ 222.

Since the record shows that TAC's BAFO generally offered the items of ST/SE that were necessary to perform the required tasks as set forth in the work specification and attachments, while PEMCO's BAFO in material measure failed to do so, we find nothing unreasonable in the agency's acceptance of TAC's BAFO and its rejection of PEMCO's BAFO as technically unacceptable.

MEANINGFUL DISCUSSIONS

PEMCO challenges the Air Force's conduct of discussions on the basis that the agency failed to inform PEMCO of the specific required items of ST/SE that it had failed to include in its BAFO.

Discussions with offerors whose proposals are in the competitive range must be meaningful--the offerors must be advised of proposal weaknesses, excesses, and deficiencies. FAR § 15.610(c)(2) and (5). Agencies are not required to afford offerors all-encompassing discussions but, rather, need only lead offerors into the areas of their proposal considered deficient. Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149.

Here, the agency clearly met this standard. As noted above, on numerous occasions, the agency cautioned PEMCO that the list of ST/SE it proposed to provide was incomplete and that its proposal was deficient under the ST/SE subfactor of the production factor, and advised PEMCO to review the list of ST/SE in attachment J and identify its proposed methodology for acquiring those items. Since the RFP contained detailed work specifications and TOs identifying which items of ST/SE were needed to perform the required depot maintenance tasks, we believe that the Air Force's advice and directions to PEMCO provided the firm with adequate notice that it should modify its BAFO to include additional required ST/SE. Further, in our view, the Air Force could reasonably conclude that specifically identifying the 21 items of ST/SE which PEMCO had failed to include in its BAFO, when such information should have been reasonably familiar to offerors that understood the TOs referenced in the solicitation, would have provided little insight regarding the depth of PEMCO's knowledge, expertise, and understanding of the solicitation requirements. Since the agency reasonably led PEMCO into the area of its BAFO which was deficient and afforded PEMCO ample opportunity to correct its deficiencies, we think the discussions were adequate. Id.

The protest is denied.

Ronald Berger
 For Robert P. Murphy
 Acting General Counsel